United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-1151

JOHN HOH, as President of BREWERY WORKERS LOCAL 3, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; and NEIL BORRA as President of BREWERY DELIVERY EMPLOYEES LOCAL 46, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Appellants,

v.

PEPSICO, INC. and its wholly-owned subsidiaries RHEINGOLD CORPORATION and RHEINGOLD BREWERIES, INC.,

Appellees.

Appeal from Order of the United States District Court for the Eastern District of New York

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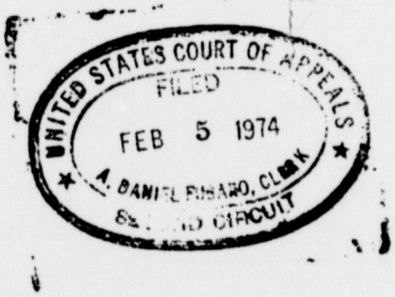
BRIEF OF APPELLEES

Of Counsel:
Herbert Prashker
Robert Morris
Kim Ebb
Lawrence A. Katz
Roger Briton
Madeline Nesse
Edward Brill
Kathryn J. Rodgers



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John Hoh, etc. et ano. v.
PepsiCo, Inc. et al (74-1151)

ERRATA SHEET FOR APPELLEES' BRIEF

p. 1, seventh line	- Insert "(Civil Action, 74-C-173 after "Bartels,")"
p. 13, sixth line	- Insert "craft" after "Breweries,"
p. 18, eighteenth line	- Substitute "Breweries" for "Rheingold"
p. 24, fourteenth line	- Substitute "appellees" for "appellants"
p. 24, twenty-first line	- Substitute "appellees" for "appellants"
p. 24, twenty-fifth line	- Delete underlining under "hearing"
p. 29, second line from bottom	- "To obtain" begins new paragraph
p. 40, tenth line	- Insert "those of" before "the"
p. 41, eighth line	- Insert citation: "(Ex. A to Petitions, 1967 Settlement Agreement, letter on third page)"

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PEPSICO, INC. and its wholly-owned subsidiaries RHEINGOLD CORPORATION and RHEINGOLD BREWERIES, INC.,

Appellees.

PRELIMINARY STATEMENT

This is an appeal by two locals of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America -- Brewery Workers Local 3, and Brewery Delivery Employees Local 46 ("The Unions")-- from an Order of the United States District Court for the Eastern District

of New York (per Bartels, J.) issued at 5:35 P.M., Friday, February 1, 1974, refusing to issue without a hearing, a preliminary injunction restraining PepsiCo, Inc. ("PepsiCo"), Rheingold Corporation ("Rheingold"), and Rheingold Breweries, Inc. ("Breweries"),* from effectuating the scheduled termination that day of most of the employees of a brewery (the "Brewery") owned and operated by Breweries in Brooklyn, New York, as part of a discontinuance of operations of that brewery pending arbitration under a collective bargaining agreement between the Unions and Breweries of claims filed for arbitration on January 30 (by mail) in connection with the proposed termination.

The application came before the District Court at approximately 11:00 A.M., Friday, February 1, 1974, in a proceeding originally filed pursuant to Section 7503 of the New York Civil Practice Law and Rules by the Unions shortly after noon on the preceding day, Thursday, January 31, in the New York Supreme Court, Kings County, for: (a) an order directing arbitration on certain issues

* Rheingold was acquired by PepsiCo in November 1972; but PepsiCo was enjoined from exercising management control until April 3, 1973 (Ahern Affidavit, Ex. A, p. 1). A merger of these two companies was finally consummated on December 31, 1973 (Ahern Affidavit, Ex. J, paras. 1,2). Breweries, a wholly-owned subsidiary of Rheingold, operates the Brooklyn brewery and, through subsidiaries, breweries in Orange, New Jersey, New Bedford, Massachusetts, and Brooklyn, New York.

arising out of the projected brewery shutdown and (b) an injunction against plant shutdown and employee termination pending arbitration. That proceeding was removed, we contend, to the U. S. District Court for the Eastern District of New York, by 1:45 P.M. on January 31, where it was assigned to District Judge John R. Bartels. Nevertheless, a Justice of the Supreme Court, sitting in Special Term, Part II, notwithstanding notice of the removal issued an Order to Show Cause at 2:45 P.M., Thursday, returnable at Special Term, Part I, of the Supreme Court, Kings County, at 9:30 A.M. the following day. The Unions having challenged the propriety of the first removal as premature because the papers had not been "served" at the time of such removal and such "service" having been made on the late afternoon of January 31, appellees filed a second removal Petition on the morning of Friday, February 1 (Civil Action 74-C-179).

Thereafter, on the call of the motion calendar in Special Term, Part I, of the Supreme Court, appellees' counsel advised that Court that the action had been "twice" removed, and that appellees were prepared immediately to proceed to the District Court where Judge Bartels had indicated his availability to hear the Unions' application. Initially resisting, appellants eventually repaired to the District Court where District Judge Bartels opened

proceedings as soon as they appeared, just past noon. The Unions then presented their applications in open Court on their state court papers, filed January 31, 1974, a supplemental affidavit of Neil Borra, served on appellees during the course of the argument on February 1, and a memorandum of law likewise served then. Appellees offered their affidavits responsive to the original motion papers, sworn to February 1, and a memorandum of law. After argument lasting until just before 2:00 P.M., the Court declared a recess, and issued its opinion at 5:35 P.M., refusing to issue a preliminary injunction without a hearing and denying a temporary restraining order on the showing then made. The refusal to issue a restraining order is not appealable (see Belknap v. Leary, 427 F.2d 496, 497 (2d Cir. 1970) and Pan American World Airways, Inc. v. Flight Engineers Int'l Assoc., 306 F. 2d 840, 841 (2d Cir. 1962), and appellants have, accordingly, appealed from the refusal to issue a preliminary injunction without a hearing.

PepsiCo, Rheingold and Breweries contend that the District Court properly denied the motion for preliminary injunction on the papers before it and without a hearing because the Unions failed to establish (a) a clear showing of probable success on the merits of their claim and a showing of irreparable injury, or (b) that their claim in

arbitration that the Company had no right to terminate the plant operation raised serious and substantial questions and that the balance of hardship pending determination of the issue tips clearly toward the Unions; and (c) that as to each item of relief granted greater injury will be inflicted upon the Unions by denial of relief than will be inflicted upon the Company by the granting of relief, and that the Unions have no adequate remedy at law. In addition, PepsiCo and Rheingold submit that the requested relief must be denied as against them because: (1) they are not parties to the arbitration agreement relied upon, and cannot be compelled to arbitration, and (2) they do not own or operate the Brewery.

ISSUES ON APPEAL

1. Was the matter properly removed to the District Court?

2. Did the District Court err in refusing to grant the motion for a preliminary injunction without a hearing?

3. Did the District Court properly deny the Unions' motion for a preliminary injunction on the ground that they failed to make a clear showing of ultimate probable success on the merits of the arbitration demands relating to the Breweries action against which the

injunction was sought?

4. Did the District Court properly deny the Unions' motion for a preliminary injunction on the grounds that they failed to demonstrate that they would suffer irreparable injury by denial of the motion, without an adequate remedy at law, and that they would suffer greater injury by such denial than appellees would suffer by the granting of the motion?

STATEMENT OF FACTS

The economic and historic background against which the events giving rise to this action occurred is significant.

The Brewing Industry in New York City

In 1950, New York City supported 17 breweries (Ahern Affidavit, para. 4). By 1972, 13 had been forced to close due to economic exigencies (id., Ex. B, p. 1). Now only two, Schaefer and Rheingold, remain (id., para. 4). The demise of the brewing industry in New York City is the result of prohibitively high local costs, restrictive union rules and relatively inefficient operations. Production figures in out-of-state facilities generally average 7,000 barrels per man per year against 3,200 barrels per man per year in Brooklyn (id., Ex. A, p. 3; Ex. B, p. 11), and the

less productive New York brewery workers are better paid (id., Ex. B, pp. 17-23).

In the spring of 1972, in an effort to save the four breweries then remaining, the Brewers Board of Trade of New York City, of which Breweries is a member, prepared a pamphlet "And Then There Were None!", which outlined the economic crisis in the Brooklyn breweries. This pamphlet was distributed to all Rheingold Breweries employees in an attempt to persuade them to forego a 1972 contract wage increase (id., para. 4). That effort failed; the Rheingold employees insisted on the wage hike (id., para 4; Ex. A, p. 3).

The city breweries were dealt another crippling blow when the out-of-area national beer companies, capitalizing on their cost and production efficiencies, launched a major compaign to capture the New York market by drastically lowering their prices (id., Ex. A, p. 3; Ex. B, p. 15). Thus, despite increasing costs, the New York City breweries could not raise prices without further eroding their competitive position (id., para. 4; Ex. A, p. 3). Facing operating losses of more than $2,500,000 (id., Ex. J, para. 2), Breweries' then Board chairman recommended to his Board in August 1972 that the Brewery be shut down or sold by September 30, 1973, if the sharp downtrend in sales and earnings could not be

reversed (id., para. 4; Ex. A, pp. 3, 4). The Board directed continuing efforts to sell.

In November 1972, PepsiCo acquired control of Rheingold but, because of anti-trust litigation, it was unable to exercise management control until a decision of the Court on April 3, 1973. Federal Trade Commission v. PepsiCo, Inc., 477 F. 2d 24 (2d Cir. 1973). New management did not actually take over until May 15, 1973 (Ahern Affidavit, Ex. A, p. 1).

Meanwhile, in April 1973, (prior to new management taking office) Breweries and the Unions entered into negotiations to extend the terms of their contract which was to expire on May 31, 1973 (Hoh and Borra Petitions, para. 9). Their subsequent settlement agreement, dated April 30, 1973, provided, in the main, that the 1972 hourly wage rate would not be increased, that delivery load limits would be increased, but also that the regular work week would be changed from 35 to 40 paid hours (id., Ex. B, p. 2). The net effect of these provisions was to increase Breweries' wage costs by 14% (by increasing the number of paid hours per week) without a commensurate increase in productivity (Ahern Affidavit, Ex. B, p. 4).

The April 1973 settlement agreement contemplated that the Brewery might be sold or shut down during its

term. Item 5 provided that successors or assigns were to be required to assume the obligations of that agreement (Hoh and Borra Petitions, Ex. B, pp. 4, 5). Further, in revising Part II, Section 9(U)(4), concerning banking of vacation time, the parties retained language which explicitly states that termination of employment includes "plant shutdown" (id., Ex. A, p. 21; Ex. B, p. 3). The parties also extended (id., Ex. B, p. 2) Part VII (B) of the prior agreement (id., Ex. A, p. 78) which includes:

> "(B) In the event that the Employer shall suspend or discontinue the operations of its plants in whole or in part, its obligations hereunder shall be correspondingly suspended or discontinued. This Agreement, however, shall be binding upon the successors and assigns of the Employer."

During 1973, Breweries' downward trend continued: sales plummeted 12.5% and the Brooklyn brewery suffered operating losses of $9,000,000 (Ahern Affidavit, Ex. A, p. 1; para. 4).

Rheingold Breweries Decision to Cease Operations -- Notice to the Unions

The "Petitions" filed by the Unions allege that they were first notified of the contemplated cessation of operations of the Brooklyn plant on January 25, 1974 (Hoh

and Borra Petitions, para. 11).* This is emphatically misleading. From mid-December 1973 on, the Unions were advised that termination of operations was contemplated and probable.

(i) On December 14, Breweries' counsel requested a meeting with representatives of the Unions to discuss the possibility that operations of the Brooklyn brewery might have to be discontinued (Ahern Affidavit, para. 7(c); Tr. 29).

(ii) On December 21,** Breweries' President, Mr. Ahern, and Mr. Hoh, President of Local 3, met to discuss the subject; since Mr. Borra was unable to attend, Mr. Hoh represented Mr. Borra for purposes of that meeting (id., para. 7(b); Tr. 26, 29). Mr. Ahern explained that brewery operations would have to be terminated in the near future because of large and increasing losses, unless a buyer could be found who was willing to take over operations (id., para. 7(b); Tr. 29). At that time, the need for further meetings on this subject, with counsel, was

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* On that date, Breweries sent a notice to its employees formally notifying them that the Brooklyn plant would cease operations as of the close of business on February 1, 1974 (Hoh and Borra Petitions, Ex. C).

** Mr. Ahern's affidavit fixes the date of this meeting as Monday, December 17. This was an error; as Exhibit F to this affidavit confirms, the meeting took place on December 21.

acknowledged, but Mr. Hoh and his counsel indicated that they might not be available for such further discussion for several weeks (id., para. 7(b); Tr. 29).

(iii) On December 24, Mr. Ahern wired Messrs. Hoh and Borra and their counsel, confirming the urgency of the situation regarding the future of the Brooklyn brewery and stating Rheingold's desire to meet with the Unions' representatives as soon as possible (id., par. 7(c); Ex. F; Tr. 28-30). The telegram made clear that Breweries asserted the right to close down and the probability that it very soon would close down. Noting continuing heavy losses, Ahern stressed that Breweries had no cash to finance its continuing operating deficit and could not expect outside sources to continue to infuse funds in view of PepsiCo's announced position that if a sale of Breweries' beer business was not consummated within a reasonable period, that business would be discontinued. He said that Breweries had been unable to find a buyer willing to take over the Brooklyn brewery operations and alluded to negotiations for a sale of the breweries to Schmidt's of Philadelphia (with whose attorneys Mr. Hoh had met) which, if consummated, would involve termination of the Brooklyn operations.

(iv) On January 2, Mr. Ahern and Breweries' labor counsel met with the Unions' presidents and their counsel. Mr. Ahern announced that because of large and increasing losses, the Brooklyn brewery would probably have to close at the end of January, and that there was little likelihood of finding a buyer to assume operations, though the search would continue (id., para. 7(d); Tr. 28, 31). This same information was imparted to the Unions' representatives, for the fourth time, the next day, January 3 (id., para. 7(e); Tr. 31).

(v) On January 7, Breweries, by a notice signed by Daniel M. Byrne, Senior Vice President, announced to all its employees the cessation of new brewing as of that date (id., para. 7(f), Ex. G; Tr. 31), that is, that no new materials were to be fed into the beginning of the brewing cycle. Since a cycle is 28 days, and the last brewing had occurred the prior Friday, January 4, this meant that unless the decision were reversed, brewing would end Friday, February 1.

(vi) By letter dated January 10, 1974, Mr. Ahern advised the Unions that Breweries would continue to search for a buyer (id., Ex. H), enclosing a copy of a letter to the same effect addressed to Deputy Mayor Cavanagh (id., Ex. I). Mr. Ahern's letter reiterated that

he would go so far as to recommend selling the plant for only $1.00 if (a) the purchaser were willing to assume the labor contracts on terms agreeable to the Unions, and if (b) the purchaser were willing to assume certain liabilities (id., Ex. G).* Also on January 10, Mr. Byrne wrote to four unions representing Breweries employees confirming his statement of the previous day that "we [Breweries] anticipated that operations at the brewery would cease by January 31, 1974" (id., par. 7 (h); Tr. 34-35).

(vii) On January 25, Mr. Ahern sent a final notice to the Brooklyn brewery employees that all operations, except for clean-up, would cease as of the close of business on February 1,1974,because of economic considerations and the failure to find a buyer willing to continue operating the plant (Hoh and Borra Petitions, Ex. C).

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* Rheingold's desire throughout to sell to a purchaser who would continue to operate the plant was reemphasized as late as January 31 when Mr. Ahern, appearing before the New York State Assembly Standing Committee on Commerce, Industry and Economic Development, Task Force to Inquire into the Proposed Closing of the Brooklyn Plant, publicly reiterated Rheingold's offer to sell to a new operator who could demonstrate his ability and willingness to operate the existing breweries (Ahern Affidavit, Ex. A, p. 5).

As the above chronology reveals, more than adequate notice of Breweries' assertion of its right to terminate Brooklyn operations, and that it might soon be forced to do so, was given to the Unions' representatives and/or the employees themselves on numerous occasions prior to January 25. Had the Unions chosen to meet with management or to seriously pursue arbitration to challenge management's rights to discontinue loss operations, the arbitrations they now request would very likely have ended by now, and there would be no need for an application to enjoin the plant shutdown pending arbitration. The Unions chose, instead, to defer arbitration, and to make a last minute effort for a Court injunction.

Unions' January 30 Request for Arbitration

On January 28, the Unions delivered a request for "adjustment" of twelve issues under the Union contracts. An Adjustment Committee meeting proved abortive, and the Unions requested arbitration of those issues on January 30 (Ahern Affidavit, para. 5, Ex. 6; Hoh and Borra Petitions, para. 15; Ex. D). On January 31, 1974, the American Arbitration Association ("AAA") mailed a list of proposed arbitrators from the AAA National Panel of Arbitrators to counsel for the parties, and requested both sides to submit their selections within seven days, i.e., by February 7. (Ahern Affidavit, Ex. D).

State Court Proceedings

On January 31, counsel for the Unions informed appellees' counsel that he intended to commence a proceeding in New York Supreme Court, Kings County, to stay the termination of operations at the Brooklyn plant pending arbitration; appellees' counsel, in turn, replied that the action would be immediately removed to Federal Court (Prashker Affidavit, para. 2). A special proceeding under New York CPLR §7503, on verified Petitions by both Locals 3 and 46, was docketed in Supreme Court, and was immediately removed to the United States District Court for the Eastern District of New York pursuant to Title 28 of the U. S. Judicial Code, Section 1441(a) and 1446, and assigned index No. 74-C-173 (Reilly Affidavit, para. 6). Counsel for appellees appeared before Judge Multer in New York Supreme Court, Kings County, and informed him that a Notice of Filing of the Petition for Removal had been filed in the County Clerk's office so that the case was no longer pending in the Supreme Court. Judge Multer, nevertheless, signed the Order to Show Cause at approximately 2:45 P.M. (Prashker Affidavit, para. 7).

The Order signed by Judge Multer, returnable less than twenty-four hours later, directed appellees to show cause why "an order should not issue...directing that the

controversies which may have arisen between...[the Unions] and...[appellees] as set forth in the petitions annexed hereto be submitted to arbitration in accordance with the arbitration clause contained in the agreement between the parties..." and that pending the determination of said arbitration appellees be enjoined "from closing or otherwise restricting the operations" of the Brooklyn brewery and from "terminating its employees," or "terminating its contract" with the Unions pending a hearing on the Order.

Proceedings Below

Appellants having challenged the propriety of the January 31, 1974 removal as premature, counsel for appellees on the morning of February 1, 1974, filed with the Clerk of the United States District Court for the Eastern District of New York a second petition and security for removal, and the new cause was assigned Index No. 74 C 179. Thereafter, a second "Notice of Filing of Petition and Security for Removal" was filed with the Clerk of the Supreme Court, Kings County.

In an affidavit filed with the District Court, Mr. Ahern stated, inter alia, that Breweries would lose more than $15 million due to prohibitive local production costs

if the Brooklyn brewery continued to operate during 1974 (Ahern Affidavit, para. 4; Ex. A, pp. 2, 3). Mr. Ahern also stated that if Breweries were required to keep its brewery open for one week after the scheduled closing date, prepare for a complete brewing cycle, and were to keep a regular complement of employees on the payroll and then terminate after a week (e.g., upon dissolution of a temporary restraining order), the Company's loss would be $1.5 million; he further stated that to require the Company to complete a full brewery cycle by remaining open for a month, the loss would be over $2 million (id., para. 8(i); Ex. J). He also declared that continued ordinary operations of the Brooklyn brewery after February 1, 1974 might force Breweries into bankruptcy and result in closing of the New Jersey and Massachusetts breweries as well (id., para. 8(iii)).

Counsel for both parties appeared in the District Court before Judge Bartels on February 1, 1974 beginning at 12:05 P.M. Judge Bartels denied the Unions' motion for a preliminary injunction* on the ground, inter

* Judge Bartels treated the Unions' application to the State Court as a motion for a preliminary injunction (Tr. 72).

alia, that they had failed to make a clear showing of probable success on the merits of their claims in arbitration (Decision, p. 6). Still later that day, the Unions filed a Notice of Appeal to this Court from the District Court's Order denying the motion for preliminary injunction.

On Saturday, February 2, 1974, Judge Bartels made an order pursuant to Rule 62(c) of the Federal Rules of Civil Procedure staying Breweries "from shutting down the Rheingold Brewery in Brooklyn, dismantling any machinery and terminating its employees represented by Petitioners until midnight on Monday, February 4, 1974" pending the Unions' appeal to this Court. On February 3, the Unions applied to this Court for an immediate hearing on their appeal and for a stay of the brewery closing pending appeal. By stipulation dated February 4, 1974, the parties agreed that, until midnight, February 9, unless this Court shall determine the appeal earlier, Rheingold will not dismantle the physical plant or equipment or sell or dispose of such unless to a person or company intending to produce beer at the brewery; Rheingold's previously announced clean-up operations and normal maintenance may continue. The stipulation does not bar Rheingold's termination of brewery employees, for such employees have received their banked and prorated vacation pay, usually paid

upon termination, pursuant to the labor agreement.

ARGUMENT

POINT I

THIS PROCEEDING WAS PROPERLY REMOVED TO THE FEDERAL DISTRICT COURT

Appellants attack the removal of this proceeding from the state court to the Federal District Court, based on an alleged contractual "waiver"by Breweries of its right to remove (Appellants' Brief, pp. 7-8). But they do not now request remand nor appeal from the District Court's oral denial of their oral motions for remand (Tr. 46). On the contrary, they persist in asking for injunctive relief from the Federal court (Appellants' Brief, p. 24). If the case is not properly in Federal court, and is to be remanded, this is not the proper forum to seek the relief requested.

In any event, the case was properly removed (see appellees' Memorandum of Law in the District Court, pp. 4-7, which has been made a part of the appeal papers). The section of the labor agreement upon which the Unions rely for their claim that Breweries waived its right to remove (Tr. 8-10) does not apply for two reasons:

(1) it applies, on its face, solely to proceedings to enforce arbitration awards. This is not such a proceeding. (2) it does not apply to the type of arbitration which the Unions seek to compel in this proceeding. The labor agreement section quoted in the Appellants brief (p. 8) is taken from Paragraph 9 of the 1970-1973 Settlement Agreement between the Unions and the Brewers Board of Trades, and it is described therein as an additional subparagraph to Part VI, Section 1(C), which governs a special type of expedited arbitration proceeding in defined circumstances following a waiver by either party of the normal arbitration procedures provided under Section (A). There has been no such waiver by the Unions in this case; the Union has purposely avoided requesting expedited arbitration under paragraph (C) and the claimed contractual waiver by Breweries of its right to removal has no application to this proceeding.

POINT II

THE DISTRICT COURT ACTED IN A PROCEDURALLY PROPER MANNER IN DENYING THE MOTION FOR PRELIMINARY INJUNCTION

The District Court Properly Denied the Motion for Preliminary Injunction Without a Hearing

At the hearing of this matter on February 1, the Court treated the Unions' application as both an application for a temporary restraining order (which it denied), and as a motion for preliminary injunction. Appellants consented to treatment of the application as a motion for preliminary injunction since the Court had indicated the desirability of giving each party an opportunity for quick appeal (Tr. 72). Counsel for the Unions observed that on such a motion he ordinarily would have the right to offer witnesses and evidence in support of the movant's allegations (Tr. 72), and requested, instead, that the temporary restraining order issued by the State Court on January 31 (notwithstanding the prior removal to the federal district court) be extended for a period of one week (Tr. 73). The Court agreed that ordinarily a full hearing is required on a motion for preliminary injunction (Decision, p. 4), but recognized that it was not possible to hold a full hearing within the

time frame imposed upon it by the Unions (Tr. 73).*

The Court ultimately declined either to extend the temporary restraining order or to issue a preliminary injunction without a hearing (Decision, pp. 6-7). In so doing, the Court did not commit error.

The Unions do not now complain of the denial of an evidentiary hearing. Neither can they complain that they did not have ample opportunity to present their case for injunctive relief to the District Court. The lack of time to determine this case prior to the scheduled termination of operations was the result of the Unions' deliberate strategy. They knew as early as December 14 (a) that Breweries asserted the right to discontinue Brooklyn operations, and (b) was contemplating doing so in the near future. They could have initiated contract adjustment and arbitration procedures at that time, or at any time thereafter. They did not do so. Even when the Brewery advised them on January 2 that it was probable that the plant would be shut down by the end of the

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*The Union had requested that Breweries be enjoined from effectuating the termination of its operations which had been scheduled for the close of business on February 1, 1974 (Hoh and Borra Petitions, para. 11). The Order to Show Cause was returnable at 9:30 A.M. on February 1. Judge Bartels began to hear the case at 12:05 P.M. on that day (Tr. 1) and finished hearing it at 1:50 P.M. (Tr. 88). The "close of business" at the brewery was 4:00 P.M. (id.).

month and announced on January 7 that now brewing had ceased, there was no request for adjustment or arbitration. They did not institute legal proceedings to prevent the brewery's closing on the basis of their last minute arbitration request until the day before the brewery was scheduled to close -- when they applied for and obtained an "Order to Show Cause on Motion for Preliminary Injunction," returnable less than 24 hours later. The Unions' strategy simply did not allow time for an evidentiary hearing on their application, nor did they request one (Tr. 72-73).*

Appellants, as we have noted, have no right of appeal from the order denying a temporary restraining order. Clearly, they cannot complain here that the District Court should not have treated their February 1 application as a motion for preliminary injunction;** on the contrary, they insist on this appeal that the District Court erred by not granting it on the record made below (Appellants' Brief, p. 24).

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*Under New York procedure, which the Unions originally invoked, a motion for preliminary injunction is ordinarily determined on affidavits rather than on an evidentiary hearing. See New York Civil Practice Law and Rules §6312(a).

**Their State court motion brought on by Order to Show Cause, returnable on one day's notice, was labelled a motion for preliminary injunction.

On the motion for preliminary injunction, the District Court held that on what the appellants had shown, it would not grant a preliminary injunction without a hearing. That determination simply cannot have been error. As noted above, the District Court's lack of time to hold a full evidential hearing is the result of the Unions' strategy to delay bringing this matter to Court until the eve of the shut down. Under these circumstances, there can be no error in refusing the injunction without a hearing, unless the Unions' moving papers, read in light of appellees' papers -- which had had to be prepared in less than 24 hours -- made the Unions' entitlement to injunctive relief so clear under applicable tests for such relief that appellants were not entitled to have an evidential hearing. In point of fact, the Unions' papers showed very little, if anything, to suggest (1) that they would ultimately obtain an arbitrator's award that the brewery could not be shut, (2) that their members would be irreparably injured by termination pending arbitration, or (3) that the balance of hardships "tipped decidedly" their way, rather than in appellants' direction.

A party choosing to rest his case on affidavits may not be later heard to complain that no testimony was taken,* nor to claim that a lesser standard of entitlement to injunctive relief was appropriate because of the absence

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* Continued on next page.

of a full hearing: "even where a party can be deemed to have waived his right to a hearing, the movant is not relieved of his burden of establishing a reliable factual basis for preliminary injunction." Dopp v. Franklin National Bank, 461 F.2d 873, 879 (2d Cir. 1972)(granting of preliminary injunction reversed where movant failed to establish entitlement); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1204-5 (2d Cir. 1970).

True, District Courts have discretion to grant motions for preliminary injunction without holding a formal evidential hearing, if there is no substantial dispute on facts essential to the Court's decision, if the decision depends more on a legal ruling than a factual one, and if speed of determination is important. Securities and Exchange Comm. v. Frank, 338 F.2d 486, 490-91 (2d Cir. 1968); Securities & Exchange Comm. v. Koenig, 469, F.2d 198, 202 (2d Cir. 1972); Ross-Whitney Corp. v. Smith Kline French Labs., 207 F.2d 190, 198 (9th Cir. 1953); International Bhd. of Elec. Workers, Local 1186 v. Eli, 307 F.Supp. 495, 505

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* Appellant's counsel offered to present testimony (Tr. 10, 72) but such an offer falls "considerably short" of an objection to proceeding on affidavits without an evidentiary hearing. Semmes Motors, Inc. v. Ford Motor Co., 427 F.2d 1197, 1205 n. 11 (2d Cir. 1970).

(D. Hawaii 1969).

Here, however, the appellants' papers, far from establishing the facts essential to the grant of an injunction beyond the necessity for hearing, were so weak as to positively establish that they could not meet the burdens imposed for preliminary injunction (see below, Point III).

B. This Court May Review The Entire Record To Determine If The Preliminary Injunction Was Properly Denied

An application for a preliminary injunction is addressed to the discretion of the trial court, and ordinarily "a clear abuse of discretion ... must be shown to an appellate court in order to obtain a reversal of the trial court's denial of temporary injunctive relief." Checker Motors Corp. v. Chrysler Corp., supra, at p. 323; Saunders v. Air Line Pilots Ass'n, Int'l, 473 F.2d 244, 249 (2d Cir. 1972). See also Unicon Mgt. Co. v. Koppers Co., supra, at 203; FRCP 25(a). Where, as here, however, there was no evidentiary hearing and thus no element of witness credibility, the appellate court is "in as good a position as the district judge to read and interpret the pleadings, affidavits and depositions and thus has broader discretion on review." Dopp v. Franklin National Bank, 461 F.2d 873, 879 (2d Cir. 1972). See also Concord Fabrics, Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315 (2d Cir. 1969). We

recognize that, due to the pressures of time, the findings and conclusions of the District Court in the case at bar may have been somewhat less than complete. However, we are certain that, upon reviewing the full record, this Court will find that the denial of the motion for preliminary injunction was eminently proper.

POINT III

APPELLANTS HAVE NOT MET THE APPLICABLE STANDARDS FOR ISSUANCE OF A PRELIMINARY INJUNCTION

A. The General Standards and §7 of the Norris-LaGuardia Act.

Appellants have not established their entitlements to an injunction against discontinuance of plant operations or termination of the employees under either traditional standards of equity or under the special provisions of the Norris-LaGuardia Act.

In Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 254 (1970), the Supreme Court held that notwithstanding the Norris-LaGuardia Act, federal District Courts have jurisdiction to enjoin strikes over disputes subject to a contractual arbitration procedure provided that traditional equitable standards for the issuance of injunctions are met. See also, Detroit Typo, Union No. 18 v. Detroit Newspaper Publishers Ass'n, 471 F.2d 872 (6th Cir. 1972), cert. den., 411 U.S. 967 (1973). As discussed below, the Unions have not satisfied these traditional equitable standards.

In Emery Air Freight Corporation v. Local Union 295, 449 F.2d 586, 588-9 (2d Cir. 1971), this Court held that employers in such suits must comply with the require-

ments of Section 7 of the Norris-LaGuardia Act (29 U.S.C. §107) to secure an injunction against a strike in such disputes. Section 7 requires that plaintiffs seeking injunctions in labor disputes establish that if the relief requested is not granted:

> "(b) That substantial and irreparable injury to complainant's property will follow;
>
> "(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;
>
> "(d) That complainant has no adequate remedy at law;...."

These Norris-LaGuardia Act provisions are as applicable to union applications for injunctions against employers as they are to employer applications for injunction against unions. Clune v. Publishers' Ass'n of New York City, 214 F.Supp. 520 (S.D.N.Y. 1963), aff'd on opinion below, 314 F.2d 343 (2d Cir. 1963); see Spritzer v. Ford Instrument Division, 72 L.R.R.M. 2073 (U.S.D.C. E.D.N.Y. 1969); A.H. Bull Steamship Co. v. National Marine Engnr's Beneficial Ass'n, 250 F.2d 332, 339 (2d Cir. 1957); Byrne v. Publishers' Ass'n of New York City, 246 F.Supp. 296, 298 (S.D.N.Y. 1965); cf. Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 562-63 (1937). To obtain a preliminary injunction in this Circuit a petitioner, under generally applicable rules,

is required either 1) to make a clear showing of probable success on the merits and establish the existence of a potentially irreparable injury which the granting of the injunction will prevent, Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir. 1969); Unicon Management Corp. v. Koppers Co., 366 F.2d 199 (2d Cir. 1966); Dino DeLaurentiis Cinematografica, S.p.A. v. D-150, Inc., 366 F.2d 373 (2d Cir. 1966). See also Berrigan v. Norton, 451 F.2d 790 (2d Cir. 1971); Imperial Chemical Industries Ltd. v. National Distillers & Chemical Corp., 354 F.2d 459 (2d Cir. 1965); Societe Comptoir De L'Industrie Cotonniere Establissments Boussac v. Alexander's Department Stores, Inc., 299 F.2d 33 (2d Cir. 1962); Byrne v. Publishers' Association, 246 F.Supp. 296 (S.D.N.Y. 1965); or 2) to raise questions so "serious, substantial and difficult" as to require more deliberate investigation, and show that "'the balance of hardships' tips decidely toward the party requesting the temporary relief." International Controls Corp. v. Vesco, et al., 2d. Cir., January 14, 1974, Slip Opinion Nos. 462, 463, 539 at 1420; Checker Motors Corp. v. Chrysler Corp., supra at 323; Unicon Management Corp. v. Koppers Co., supra, at 205; Dino DeLaurentis Cinematografica, S.p.A. v. D-150, Inc., supra. In addition, under §7 of the Norris-LaGuardia Act, the applicant must meet the requirement of §7(c) as to each item of relief granted.

As discussed below, the Unions have failed to meet any of these standards for the granting of injunctive relief.

B. The Court Below Correctly Inquired Into the Probability of Success on the Merits.

In Appellants' Memorandum of Law to this Court, (hereinafter "Appellants' Memo"), it is urged that the District Court improperly applied the test of "probability of success" on the merits, in that it considered the likelihood of success before the arbitrator rather than, "the proper test [which] was the Unions' success on the matter before the Court, i.e., whether the alleged disputes are arbitrable, and the Court should compel arbitration thereof." (Appellants' Memo., p. 9). Many frivolous claims are arbitrable. What the Unions suggest is that, under this Court's general equity doctrines, a District Court may grant interlocutory relief enjoining an employer from taking action challenged by an arbitrable claim (even one conceded to be arbitrable) pending the arbitrator's decision on that claim, even though the arbitrable claim is patently, or probably, unworthy. The suggestion is absurd and unworkable. In asking for a "preliminary injunction" pending arbitration, the appellants plainly treat the arbitration for these purposes as analogous to a trial on the merits in the District Court.

If a preliminary injunction in aid of federal jurisdiction requires probability of success in a judicial trial, a preliminary injunction in aid of arbitral jurisdiction must require probability of success before the arbitrator. That is the test the Courts appear to have followed.

In Brandenburg v. Capital Distrib. Corp., 353 F. Supp. 115, 120 (S.D.N.Y. 1972), the court denied an injunction of mass layoffs pending arbitration: "The likelihood of success by the plaintiff in enjoining the layoff [in arbitration] is not apparent" (id. at 120). In International Union of Elec. Workers v. Radio Corp. of America, 77 L.R.R.M. 2201 (D.N.J. 1971), here cited by the Unions (Appellants' Memo., p. 16), the Court said:

> "Although the merits of the dispute are not for this Court to evaluate, it is discernible that the Union's claim is not frivolous and that it has a good likelihood of prevailing at the pending arbitration" (id. at 2203; emphasis added).

IUE v. Three River Industries, 78 L.R.R.M. 2090 (D.C. Mass. 1971), also cited by the Unions (p. 16) for the proposition that the Court may make no inquiry into the merits of an arbitrable dispute, contained an express finding by the Court that the "Company presently is not performing its obligations under the terms and provisions of this collective bargaining agreement" (id. at p. 2090). The Steelworkers

trilogy, United Steelworkers of America v. American Mfg. Co., 363 U.S. 564; United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574; United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, relied on at pages 12-16 of the Appellants' brief to establish the limits on a court's inquiry into the merits of arbitrable disputes, involved only motions to compel arbitration, and made no findings whatsoever with respect to the standards for the issuance of an injunction pending arbitration.* Ice Cream Drivers v. Borden, Inc., 433 F.2d 41 (2d Cir. 1970), cited at page 16 of the Unions' brief, involved no injunction, but only an order to submit to arbitration.

The Unions also rely on Amalgamated Food Employees Union, Local 590 v. National Tea Co., 346 F.Supp 875 (W.D. Pa. 1972). There, however, the Court granted a preliminary injunction pending arbitration, relying heavily on the terms of the arbitration agreement between the parties which provided, in addition to the standard agreement not to engage in strikes or lockouts pending arbitration, an agreement

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*Motor Coach Employees v. Greyhound, 225 F. Supp. 28 (D.C.C., 1963) cited at page 10 of Appellants' Memorandum to establish that the district court should not consider the merits of the dispute as to which arbitration is sought, cites as authority for its refusal to consider the merits before enjoining a transfer of work pending arbitration, the language of the Supreme Court in Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 which, as noted above, did not seek injunctive relief, but simply sought an order directing arbitration.

that "there shall be no work interruption of any kind, pending the decision of the Board of Arbitration" (id. at 879, n.5). The Court there was doing no more than providing specific enforcement of the terms of an agreement to arbitrate and to permit no interruption of work pending decision. The arbitration agreement sought to be enforced herein contains no comparable provision.

C. Appellants Have Not Shown Any "Irreparable Injury" Which Would Result From Closing of the Breweries Pending an Arbitration Award -- Adequate Remedies at Law Are Available for the Claimed Injury.

The Appellants' claims of irreparable injury (Brief pp. 4-5), based on Mr. Borra's supplemental affidavit filed February 1, without opportunity for reply, are conclusory, insufficient, and apparently rebutted by other evidence in the record.

a) It is said (Brief, p. 4; Supplemental Aff. of Borra, p. 2, Para. (b)) that Breweries' employees "have industry-wide seniority rights accumulated over a period of 20 or 30 years which will be adversely affected if there is a significant break in continuous service", and therefore that they are threatened with irreparable injury. That allegation is not true. Under the labor agreement, Part I, Sec. 10 (Seniority), a layoff does not break con-

tinuous service of employees with seniority until a period of "6 months or more" has passed. First, there has been no suggestion by the Union that anything like six months could be expected to pass before an arbitrator's decision on its claims is rendered, and in fact it undoubtedly will be considerably less than six months; the Ballantine proceeding finished 2-1/2 months after the shutdown. Second, a layoff later determined by an arbitrator to have been in violation of a labor agreement or otherwise wrongful would clearly not subject the laid-off employee to loss of continuous service credit.

b) The Unions urge (Brief, p. 5; Supp. Affidavit of Borra, p. 2, Para. (c)), that the termination of Breweries' brewery employees "will cause many of those employees to invoke their industry-wide seniority rights thereby immediately causing an untold number of F & M Schaefer Brewing Company employees to be bumped from their jobs." Again, this allegation is not true. The labor agreement provides for industry-wide bumping only for Brewery Department or Bottling Department employees with five years or more of seniority who may bump "men with less than five years seniority". Part I, Sec. 10 (11), p. 27, 1967 Settlement Agreement, Para. IVB. The Unions have not claimed, nor could they truthfully do so, that any Schaefer Brewing or Bottling Department employees

have less than five years seniority; thus no such employees are subject to bumping.

c) The Unions' argument (Brief, p. 5; Supp. Aff. of Borra, p. 2, Para. (d)) that "any significant break in service involving the discontinuance of employer contributions to the Union Welfare Funds will leave these employees and their families without essential health and life" conveniently glosses over the fact that the Unions claimed (and we may yet agree) that the labor agreement requires that such contributions continue for six months after layoff. (See Issue No. 10 submitted for arbitration; Part I, Sec. 15(A)(c), p. 45.) If it is not paid, and an arbitrator finds it should have been paid, the Company can be required to make up the loss. (At worst, the only item of relief this might suggest is that Breweries pay for Health and Welfare pending arbitration, if the union bonds the claim.) See Brandenburg v. Capitol Distrib. Corp., supra, 353 F.2d at 120.

The Unions' allegation (Brief, p. 5; Supp. Aff. of Borra, p. 2, Para. (d)) that "any significant break in continuous service may cause the cutoff of pension rights" and "may result in certain employees losing all rights to pension benefits" is singularly ambiguous and lacking in explanation of how this might happen. In any event, there is no basis for assuming that an arbitrator's award on the

issues submitted by the Unions would be ineffective to restore any affected rights of employees.

For cases denying injunction against termination of employment where "irreparable injury" is alleged, see Rochester Independent Workers, Local 1 v. General Dynamics Corp., 76 L.R.R.M. 2540 (W.D.N.Y. 1970), and especially Clune v. Publishers' Ass'n of New York City, 214 F.Supp. 520 (S.D.N.Y.), aff'd on opinion below, 314 F.2d 343 (2d Cir. 1963), where the Court stated:

> "The plaintiffs' chief and perhaps only complaint is that the newspapers are not being published, and that they are thus denied employment opportunities. Since the claim is primarily for loss of wages, no irreparable loss of a character to invoke injunctive relief exists. Damages would provide sufficient relief if the plaintiffs are successful at trial." 214 F. Supp. at 531. (Emphasis added)

Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., 363 U.S. 528 (1960), cited by the Unions, is clearly distinguishable. It involved not an injunction against termination of an operation, but an injunction against a strike, for which continuing employment was imposed as a condition.

Union reliance on Morrison Cafeterias, Inc. v. NLRB, 431 F.2d 254 (8th Cir. 1970) is similarly misplaced. The case did not concernitself with the standards for injunc-

tive relief for maintenance of the status quo.

Appellants, having produced no evidence of irreparable injury on the face of their own papers were properly denied a preliminary injunction.

D. The Unions Have Failed to Establish a Likelihood of Success on the Merits

In the instant case, the Unions have made no showing which could justify the conclusion that there exists a probability of success before the arbitrator of the proposition that the employer had no right to terminate operations. While it was alleged that there had been some unspecified "previous commitments" to the Unions that would be breached by the termination of operations (Hoh and Borra Petitions, para. 12), the Unions offered no evidence to support such allegations. The District Court properly found that their probability of failure on this issue before the arbitrator is high (Decision, p.5), since Part VII(B) of the labor contract (Hoh and Borra Petitions Ex. A) provides that if Rheingold "shall suspend or discontinue the operations of its plants in whole or in part, its obligations hereunder shall be correspondingly suspended or discontinued." A provision discontinuing obligations under the contract in the event that operations are discontinued hardly comports with the existence of a commitment to maintain operations throughout the term of the contract. Rather it indicates that the parties were aware of, and addressed themselves specifically to, the possibility of a termination of operations. The same conclusion was reached on similar facts in Bakery Workers v. Great Atl. & Pac. Tea Co., 357 F. Supp. 1322, 1323-24

(W.D. Pa. 1973). The existence of the contractual provision for discontinuance of operations certainly justifies the Court's finding that the Unions did not have a likelihood of success before the arbitrator on the issue of Rheingold's asserted "commitment" not to close its Brooklyn brewery.

The Unions seek to attack the significance of the "Discontinuance of Operations" clause by reference to the arbitrator's decision in the Matter of Joseph Schlitz Brewing Co., 58 L.A. 653 (1972), in which, based on facts which the arbitrator himself distinguished from the instant case, the arbitrator ruled that the company could not shut its New York plant and relocate the same beer production elsewhere despite the existence of such a clause. The arbitrator began his discussion by stating that (1) the Schlitz situation was "certainly not the traditional termination of operations" case, but rather involved the transfer of operations to other Schlitz plants "where, it is conceded, the operations will continue" (58 L.A. at 657); (2) "the Employer [made] no claim of financial distress, but rather that profitability of the enterprise [would] be increased by the move (ibid.)*; and (3) the Company had recently sent all employees a letter

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*The arbitrator found "no protestations of economic distress, which, if convincingly apparent, might have given the Arbitrator pause" (58 L.A. at 658). Throughout his decision the arbitrator emphasized the absence of economic problems as a significant factor.

announcing its intention to operate the plant "indefinitely" (id. at 661). While Rheingold has a brewery in Orange, New Jersey and New Bedford, Mass., and those breweries are scheduled to continue in operation, temporarily at least, its agreement with the Union prohibits Breweries from using beer produced there to service the markets previously satisfied from Brooklyn (there is thus no relocation of operations here).

With regard to other issues submitted by the Unions to arbitration which purportedly challenge Breweries' right to cease operations at its Brooklyn facility (see Issues, 1, 3, 4, 5 and 12 listed in Ex. D to Hoh and Borra Petitions and Ex. C to Ahern Affidavit), the Appellants have also failed to demonstrate any likelihood of the success on the merits of these issues. Issues, 1, 3, 4 and 5 depend upon proof of "representations" allegedly made by Rheingold "concerning the continuance of its operations" and Rheingold's "failure to disclose critical information concerning such continuance" during the 1973 contract negotiations. Since the moving papers provide no evidence whatsoever what such "representations" were or what the "failure to disclose" was, no likelihood of success has been demonstrated on these issues.

Issue 3 also alleges that a cessation of operations constitutes a "layoff," in violation of Part I, Section 11,

subdivisions (A), (B) and (C) of the contract dealing with procedures to be followed in "layoffs." (Ex. A to Hoh and Borra Petitions). It is clear that establishing this proposition in arbitration is not a likely probability. See Brandenburg v. Capitol Distrib. Corp., supra, at p. 119.

Issue 4 also alleges a violation of Part I, Section 4 of the contract, dealing with "discharge," particularly "discharge for cause" (Ex. A to Hoh and Borra Petitions), but there is little likelihood that an arbitrator would find a termination of operations to constitute a "discharge" within the meaning of that provision. See Local Lodge 2040, IAM v. Servel, Inc., 268 F.2d 692, 698 (7th Cir.), cert. denied, 361 U.S. 884 (1959).

Issue 12 alleges a violation of Part IX of the contract, the "Duration" clause (Ex. A to Hoh and Berra Petitions). This issue, too, would have little chance of success in arbitration, since it is universally held that a discontinuance of operations during a contract term does not violate a "duration" clause -- that clause applies only while the employer-employee relationship is intact and does not guarantee that relationship. Fraser v. Magic Chef Food Giant Markets, Inc., 324 F.2d 853, 856 (6th Cir. 1963); Bakery Workers v. Great Atl. & Pac. Tea Co., supra, at p. 1324; American Bakery Workers v. Liberty Baking Co., 242 F.Supp. 238, 245 (W.D. Pa. 1965).

The remaining issues submitted to arbitration -- issues 2, 6, 7, 8, 9 10 and 11 -- do not themselves challenge Rheingold's right to terminate operations, and thus the Unions' likelihood of success on these issues is not relevant to their equitable entitlement to an order restraining such termination. These issues, as the District Court properly found, "can be arbitrated after the closing of the plant" (Decision, p.6).

A review of arbitrators' awards on identical or comparable facts further emphasizes the inherent lack of probability of success on the merits of the Unions' claims once this matter reaches arbitration.

One relevant arbitration award is that of Thomas Christensen, dated February 2, 1974 (attached hereto) rejecting the claims of Rheingold's four "craft" unions that the closing of the Brooklyn brewery violated their labor contracts. The arbitrator held that the closing was not a "lockout" and said: "I cannot conclude that these agreements contained a mandate against <u>any</u> shutdown, whatsoever" (Award, p.2).

Also relevant is the award of Arbitrator Eric Schmertz in a case involving the Ballantine shutdown in Newark in 1972 under conditions similar to those here (Ex. E to Ahern Affidavit). In <u>Ballantine</u>, the company, facing a financial crisis (p.3), sold its label, trademarks and other

property rights to another concern and ceased all operations (p.5). There too the Union (represented by Appellants' counsel) challenged the shutdown as a violation of (1) an alleged "commitment" to continue in business for the term of the labor contract or to sell the business only as a going concern, and (2) relied on provisions of the collective bargaining agreement dealing with the establishment of the bargaining unit, subcontracting, union jurisdiction, seniority and vacation rights, and discharge and layoff procedures (p.7).* All such claims were rejected.

The Appellants have shown neither probable success on the merits nor have they raised serious, substantial or difficult questions requiring more deliberate investigation. Nor have they shown a threat of irreparable injury that would justify the issuance of an injunction under either of those standards.

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*Ballantine ceased operations on March 31, 1972 (p.5). Although the union was aware of the impending termination of business on March 3 (ibid.), it chose to arbitrate after the termination, rather than before. The union also lost court actions seeking to restrain the termination (p.6).

E. Appellants Have Failed to Demonstrate That Denial of the Relief Sought Would Impose Greater Hardship on Them Than Would Granting of Such Relief Impose Upon Appellees

Appellants cite National Maritime Union v. Commerce Tankers, 325 F. Supp. 360 (S.D.N.Y. 1971), rev'd on other grounds, 457 F.2d 1127 (2d Cir. 1972), in support of the requirement that the court, in weighing the equities, should find that they "favor the employees and the Union and disfavor the Company by a heavy preponderance" (Appellants' Memo., pp. 22-23). The case is distinguishable. There the court, having concluded that the Union had established an "overwhelming probability" of success on the merits (325 F. Supp. at 366), balanced the Union's undoubted "interest in the preservation of work for its members," against the employer's "regrettable but unappealing sorrow of self-inflicted wounds" caused by the employer's purposeful delay of arbitration and resolution of union claims (ibid.). Here, it is the Unions that have delayed presentation of the claims and submission to arbitration, there is little likelihood of success, and the balancing of the equities or hardships "tips decidedly" in favor of the appellees.

As we have noted, appellants have not established that there will be irreparable injury if the plant remains shut and the employees remain terminated pending arbitration. It should be noted too that Breweries' employees have not

been left without resources pending arbitration. They will be receiving wages on February 7 for work performed during the week prior to February 1 (Ahern Affidavit, para. 8(ii)), while the company has already paid some 2 million dollars in banked vacation pay, or an average of $1,500 per employee, due upon termination of operations.

Granting the preliminary relief requested by the Unions would cause Breweries substantial and irreparable loss. The affidavit of Richard I. Ahern, President and Chief Executive Officer of Breweries, establishes that the company would sustain a $1.5 million loss if required by such an order to keep its brewery open for a single week after the closing date (Ahern Affidavit, para. 8). If the 28-day brewing cycle were continued during the entire month of February, the estimated loss rises to $2 million. As Mr. Ahern has stated, "continuance of ordinary Brooklyn operations by Rheingold Breweries, Inc. after February 1, 1972 [sic], whether by court order or otherwise, may force bankruptcy, and result in a hasty closing, by a bankruptcy trustee, of not only the Brooklyn brewery, but of the New Jersey and New Bedford operations as well" (id. at para. 8(i)). It is clear that even if the Union posted an enormous injunction bond to cover Breweries' loss,* substantial and irreparable injury

* It is unlikely that the Unions could post an undertaking here. They were unable to post a $100,000 bond to cover Judge Bartels two-day injunction pending appeal.

would still be caused not only to Breweries, but to its employees and its creditors as well, if it were required by the court to continue operations at an enormous loss.

In balancing the equities, one additional factor should be considered--namely, the Unions' delay until the last possible moment before seeking a preliminary injunction against closing of the Brooklyn brewery. In Phillips v. Burlington Industries, Inc., supra, the Court denied an application by the NLRB Regional Director to restrain the employer from "shutting down" pending bargaining with the union over the effects of the employer's actions, citing, inter alia, the delay in bringing the application for injunctive relief from the date when plaintiff and the Union first had notice of the proposed liquidation. 199 F. Supp. at 593.

The Unions' calculated delay here has placed the court and the parties in a false posture of crisis by its request for hurried action, and undercuts any equitable claim appellants might otherwise have had to the maintenance of the status quo pending arbitration. See Brookhaven Housing Coalition v. Kunzig, 341 F. Supp. 1026, 1030 (E.D.N.Y. 1972); Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc., 335 F. Supp. 278, 280 (S.D.N.Y. 1971).

CONCLUSION

For the reasons stated above, this Court should affirm the ruling of the District Court denying the application for a preliminary injunction pending arbitration.

Dated: New York, New York
February 5, 1974

Respectfully submitted,

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